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Legislation—Personal Service of Process—Has the Legislature Gone Far Enough?

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LEGISLATIVE NOTES

LEGISLATION — PERSONAL SERVICE OF PROCESS — HAS THE LEGISLATURE GONE FAR ENOUGH?

Upon the recommendation of the Judicial Conference of the State of New York,[1] the 193rd session of the New York State Legislature revised section 308 of the Civil Practice Laws and Rules,[2] thereby altering the notice requirements for in personam jurisdiction.[3] The plaintiff need no longer attempt in-hand service before resorting to an alternate method. Substituted service in the first instance represents a significant change in New York practice. This note will consider the new provision and evaluate other solutions to the problems presented by traditional personal service.

In the past, New York required personal service upon the defendant or his agent in the first instance.[4] Substituted service could only be utilized after a diligent attempt at personal in-hand service had failed.[5] The "nail and mail" substituted service provision provided for delivery to the defendant by mailing the summons to the defendant's last known address and either affixing the summons to the door of the defendant's place of business, dwelling house or usual place of abode or delivery therein to a person of suitable age and discretion.[6] If the server found the other statutory methods of service impracticable, he could move the court to devise a further method of service which would do justice to all parties.[7]

The traditional methods of personal in-hand service and "nail and mail" substituted service are retained in the revised CPLR section 308.[8]

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1. NEW YORK STATE JUDICIAL CONFERENCE, REPORT TO THE 1970 LEGISLATURE IN RELATION TO THE CIVIL PRACTICE LAW AND RULES 32-37 [hereinafter cited as JUDICIAL CONFERENCE REPORT 1970].

2. N.Y. CIV. PRAC. LAW § 308 (McKinney Supp. 1970-71) [hereinafter cited as new CPLR § 308].

3. *See* W. BLUME, AMERICAN CIVIL PROCEDURE 275-77 (1955); F. JAMES JR., CIVIL PROCEDURE 621 (1965); *In re* Bennett's Estate, 135 Misc. 486, 238 N.Y.S. 723 (Sur. Ct. 1929).

4. N.Y. Sess. Laws [1962] ch. 308, §§ 308(1) and (2) (repealed 1970) [hereinafter cited as former CPLR § 308].

5. Former CPLR § 308(3).

6. *Id.*

7. *Id.* § 308(4). *See* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

8. New CPLR § 308(1) is identical to the in-hand service requirement of the former § 308(1). New CPLR § 308(4) is similar to former CPLR § 308(3) with certain exceptions. Under the former § 308(3), substituted service could be attempted only after a diligent attempt at in-hand delivery to the defendant. There was no requirement that the server also attempt service on an agent of the defendant. Under the new CPLR § 308(4), "nail and mail" substituted service must follow a diligent attempt at service on an agent as well as the defendant. This additional requirement would appear to

Similarly, there remains an avenue for court fashioned modes of service if all other statutory methods are deemed impracticable.[9] The recently enacted CPLR section 308(2), however, allows a form of substituted service in the first instance.[10] The summons, although still delivered by a process server, no longer need be delivered directly to the defendant. The new provision states that except for matrimonial actions,[11] personal service in the first instance may be accomplished by

> delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known address.[12]

Proof of such service, including identification of the recipient, and the date, time, and place of service, must be filed with the appropriate court 20 days after service. The service is deemed complete 10 days after such filing.

Although this represents a departure from the traditional service methods in New York, it is not an innovation in American law.[13] The rules of procedure for the federal district courts and many state courts also have provisions which allow service in the first instance to someone other than the named party.[14] Difficulty in locating a defendant who travels, excessive cost, ease of evasion, and undue consumption of time comprise the primary reasons for the widespread use of substituted service. Another prominent consideration in New York was the frequent incidence of falsly sworn

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render resort to the "nail and mail" service more difficult than under the former CPLR § 308(3). Such a result is inconsistant with the liberalizing approach of the new statute and should be remedied.

Excluded from the new CPLR § 308(4) is that portion of the former CPLR § 308(3) dealing with delivery of the summons to a person of "suitable age and discretion." This phrase is now found in the new CPLR § 308(2). Matrimonial actions are explicitly excluded from the new version. *See* note 11 *infra.*

9. New CPLR § 308(5). This section is identical to former § 308(4) except that service under the new substituted service § 308(2) must also be attempted prior to its invocation. *See* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968) and note 38 *infra.*

10. New CPLR § 308(2). This is the crucial innovation in the new § 308.

11. New CPLR § 308(2), (3), and (4) each explicitly exclude matrimonial actions. These specific exclusions were designed to conform the statute to the service requirements of the N.Y. DOM. REL. LAW § 232 (McKinney 1964), which restricts service of summons and complaint to personal delivery and publication only. *See* Root v. Root, 43 Misc. 2d 337, 250 N.Y.S.2d 933 (Sup. Ct. 1964).

12. New CPLR § 308(2).

13. *See* note 14 *infra.* It is also significant to note that such a procedure has been considered in New York for some time. *See* SECOND PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 156-58 (1958).

14. 28 U.S.C.A. Rule 4(d)(1) (1960); GA. CODE ANN. § 81-202 (Supp. 1969); IND. ANN. STAT. § 2-803 (1967); MASS. GEN. LAWS ANN. ch. 223, § 31 (1958); OHIO REV. CODE ANN. § 2703.08 (Page 1964).

service of process affidavits which resulted from the requirement that personal service to the defendant be attempted in the first instance. As the Judicial Conference said,

> the present section 308, which allows 'substituted' service only if attempts to serve personally have been made with due diligence, impose such burdens on the process server, especially in the present circumstances of heavily increasing litigation, that abuse, in the form of false affidavits of service, has become widespread. . . . Proposed section 308 would greatly curtail this abuse by eliminating one of its main causes: the burdensome efforts now required under the rubric of 'due diligence' to serve process by personal service (which may be impossible in many cases) before 'substituted' service may be resorted to.[15]

During deliberations, the Judicial Conference considered the defendant's constitutional right to adequate notice.[16] Federal Rule 4(d)(1)[17] is similar to the New York provision and service under the former has been held constitutional.[18] There is, however, a difference between the two rules. The federal rule includes the words "residing therein"; section 308(2) does not contain such phraseology. Under the New York provision the recipient of the summons must be *at* the actual place of business, dwelling place or usual place of abode but need not reside or live therein. This difference renders section 308(2) somewhat broader in scope than its federal counterpart. *Zuckerman v. McCulley*[19] held that service upon a servant who did not live in defendant's house did not meet the requirements of Federal Rule 4(d)(1). Under the present New York provision, however, such service might well be considered to conform to the New York statutory requirement. Such a circumstance does not, of course, necessarily indicate that the defendant will not receive adequate notice as required by the fourteenth amendment.[20] *Zuckerman* involved statutory, rather than constitutional, interpretation. The additional New York requirement of mailing to the defendant's last known address tends to insure that notice is "reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action."[21] This conclusion is fortified by the court's finding in *Entwistle v. Stone*[22] that service under the former CPLR section 308(3) was calculated to insure notice. That provision, like the revised CPLR section 308(2), did not include the phrase "residing therein".

15. JUDICIAL CONFERENCE REPORT 1970, at 34-35.
16. *Id.* at 37.
17. 28 U.S.C.A. Rule 4(d)(1) (1960).
18. *See* Jackson v. Heiser, 111 F.2d 310 (9th Cir. 1940).
19. 7 F.R.D. 739 (E.D. Mo. 1947), *appeal dismissed,* 170 F.2d 1015 (8th Cir. 1948).
20. U.S. CONST. amend. XIV, § 1. *See* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).
21. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950).
22. 53 Misc. 2d 227, 278 N.Y.S.2d 19 (Sup. Ct. 1967).

Nonetheless the *combination* of affixing the summons to the present place of business, dwelling house or usual place of abode and mailing to the last known address was deemed to fulfill the constitutional requirement.[23] The present provision does not alter the mailing requirement. It does, however, replace the affixing provision with delivery in-hand to a person of suitable age and discretion at the actual place of business, dwelling house or usual place of abode. It would seem that actual delivery of a summons to a person at the defendant's business or residence is as constitutionally sufficient as nailing it to the defendant's door.[24]

A determination that section 308(2) is constitutional does not necessarily mean it is the most appropriate means of solving the problems enumerated by the Judicial Conference. Other methods of service in the first instance may be more apt to avoid excessive cost, evasion of service, undue consumption of time, and affidavit battles.

The legislative session which enacted the new CPLR section 308(2) also considered an alternative proposal for personal service in the first instance by certified mail, return receipt requested.[25] The bill, which had been considered in similar form by the Judicial Council in 1937,[26] would permit service of summons

> . . . if the summons is delivered by the postman to the addressee or to any other person qualified to receive the addressee's certified mail in accordance with the rules and customs of the United States post-office department, or if the addressee or his agent refuses to receive the certified mail, and written notice of such

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23. *Id. See also* 39 ST. JOHN'S L. REV. 421 (1965). *See generally* SENATE FINANCE AND ASSEMBLY WAYS AND MEANS COMMITTEE, N.Y. LEG. DOC. No. 15, at 266 (1961).

24. That the new section is calculated to adequately inform the defendant of the proceedings does not, however, indicate that application of the provision to any particular case will be mechanical. The new provision is replete with terms requiring judicial interpretation. State and federal cases have not been consistent. *See* First Nat. Bank & Trust Co. v. Ingerton, 207 F.2d 793 (10th Cir. 1953). Decisions tend to rely on the particular fact situation of each case rather than on precise judicial definition of such statutory terms as "dwelling place," "usual place of adobe" and "suitable age and discretion." *See* Karlsson v. Rabinowitz, 318 F.2d 666 (4th Cir. 1963). *Compare* DeGeorge v. Mandata Poultry Co., 196 F. Supp. 192 (E.D. Pa. 1961) *and* Joyce v. Bauman, 11 N.J. Misc. 237, 165 A. 425 (1933).

25. S. 5879, 193d Sess. (1970); A. 632, 193d Sess. (1970). The bills were introduced by Senator Gioffre in the N.Y.S. Senate and by Assemblyman Balleta in the N.Y.S. Assembly on January 7, 1970. The bills were committed to the Committee on Codes in the respective legislative bodies. The bills, to be designated § 308-a, would have amended the former CPLR § 308.

26. THIRD ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK, N.Y. LEG. DOC. No. 48, at 281-98 (1937).

service and refusal together with a copy of the summons is forthwith sent to the addressee by ordinary mail.[27]

Proof of service under this proposal would be relatively simple[28] and an attempted service by this method would in no way impair one's right to serve the summons by any other authorized method.[29]

The bill's endorsement of the mails as an adequate means of giving notice is not, in itself, new. New York has used the mails for service of court papers[30] and for service of summons in Small Claims Courts.[31] Other states have also accepted the use of mails in certain situations.[32] The California Legislature, as part of a total revision of the state civil procedure, enacted a provision[33] which allows personal service in the first instance by ordinary mail. That statute provides for an acknowledgment

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27. S. 5879, 193d Sess., § 1(b)(2) (1970); A. 632, 193d Sess., § 1(b)(2) (1970).

28. Proof of service of summons by certified mail upon a natural person must be made by (1) an affidavit on personal knowledge of the mailing of a true copy of the summons by certified mail, with return receipt requested, and (2) either (a) an official return receipt purporting to be signed by the addressee or by a person qualified to receive the addressee's certified mail, or (b) a notation placed by the postal authorities on the original envelope containing the summons, that receipt thereof was refused, and an affidavit on personal knowledge that written notice together with a copy of the summons was, forthwith after such refusal, sent to the addressee by ordinary mail, setting forth the facts of service and refusal. The affidavits of mailing must set forth the time and place of mailing, the name and address of the addressee exactly as they appeared on the envelope, and the facts showing that such address is the address of the defendant or other person required to be served. Proof of such service and the summons shall be filed with the clerk of the court designated in the summons and service is complete ten days thereafter.

Id. § 1(c).

29. *Id.* § 1(a).

30. N.Y. CIV. PRAC. LAW § 2103(b)(2) (McKinney 1963).

31. N.Y.C. CIVIL CT. ACT § 1803 (McKinney 1963).

32. ARIZ. REV. STAT. ANN. Rule 4(e)(2)(a) (Supp. 1969); FLA. STAT. ANN. § 48.161 (1969); MICH. COMP. LAWS ANN. § 600.1913 (1)(a) (1969); N.J. RULES 4:4-(4)(j) (1969). England has also used the mails. *See* SERVICE OF PROCESS (Justices) Act, 23 & 24 Geo. 5, ch. 42 (1933).

33. CAL. CIV. PRO. CODE § 415.30 (West Supp. 1969). The statute states in part:
(a) A copy of the summons and of the complaint shall be mailed (by first class or air mail, postage prepaid) to the person to be served . . . .
. . . .
(d) If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgement form . . . within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method
. . . .

See generally Note, 21 HASTINGS L.J. 1281 (1970); Note, 10 SANTA CLARA L. REV. 192 (1969).

form[34] to be signed by the defendant or his agent as proof of receipt, whereas the proposed section 308-a would accept a properly signed official postal return receipt as proof of service.

Courts have long acknowledged the accuracy of the mails. The New York Vehicle and Traffic Law provides for notice by registered mail in the case of a non-resident motorist.[35] Although the Vehicle Law can be distinguished from the proposed section on the basis of applicability to non-residents, it is significant to note how the courts have viewed that statute. Commenting on a substantially similar predecessor of section 253 of the present Vehicle and Traffic Law,[36] the New York Court of Appeals said that it

> provides for transmission of notice by registered mail — a method which, with almost absolute certainty, insures delivery to the place of address, and the return receipt of the addressee made out in accordance with the forms provided . . . affords, at least, reasonable certainty that the notice has been delivered to the proper person.[37]

Similarly, in certain circumstances, service by ordinary mail has been upheld under former CPLR section 308(4).[38]

With certain modifications,[39] the proposed section would meet constitutional standards. In personam jurisdiction requires adequate notice to

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34. CAL. CIV. PRO. CODE § 415.30(b) (West Supp. 1969).

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS

This acknowledges receipt of (insert date) of a copy of the summons and of the complaint at (insert address).

DATE _____
(Date this acknowledgement is executed)

_____
(Signature of person acknowledging receipt, with title if acknowledgment is made on behalf of another person)

35. N.Y. VEH. & TRAF. LAW § 253 (McKinney 1970).

36. N.Y. Sess. Laws [1929] ch. 54, § 52.

37. Shushereba v. Ames, 255 N.Y. 490, 494, 175 N.E. 187, 188 (1931). *See* Johnson v. Bunnell, 8 App. Div. 2d 832 (2d Dep't 1959).

38. *See* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968). In allowing service by ordinary mail under former CPLR § 308(4), the Court of Appeals provided a simple standard for any court-ordered method of service. The defendant must be given a reasonable form of notice in light of all the circumstances, not the least of which is the defendant's own conduct.

39. *See* note 50 *infra* and accompanying text.

the defendant.[40] In *Mullane v. Central Hanover Bank and Trust Co.*,[41] the United States Supreme Court stated:

> An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[42]

It is upon this standard that the constitutional validity of any chosen method of service of process is to be tested.[43] The Court has considered the use of the mails in light of this fourteenth amendment notice requirement. In comparing notice by mail to notice by publication, the Court has said that "[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."[44] The Court further indicated its high regard for the mails when it concluded that "[h]owever it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication."[45] The New York requirement of certification further increases the likelihood of delivery to the defendant.

There is, however, one provision of the proposed bill which may raise due process questions:

> [S]ervice shall be valid if the summons is delivered . . . to the addressee or any other person qualified to receive the addressee's

40. *See* F. JAMES JR., *supra* note 3, at 612. Establishment of a court's jurisdiction over a defendant requires a basis for assertion of the court's power over the parties as well as adequate notice to the defendants. New CPLR § 308(2) and the proposed mailing provision do not, however, pertain to the former of these two requirements.

The notice requirements in an in rem or quasi in rem proceeding are somewhat different than those in an in personam action. In the former actions, it is the defendant's property or status which is under the court's jurisdiction and upon which the court will rule. Constructive notice by publication may be used in such actions because "[t]he law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him. . . ." Pennoyer v. Neff, 95 U.S. 714, 727 (1877). *See generally* 42 AM. JUR. *Process* §§ 61-62 (1942); Annot., 126 A.L.R. 664 (1940); Burton v. Davis, 259 N.C. 473, 131 S.E.2d 27 (1965); Fishman v. Sanders, 15 N.Y.2d 298, 206 N.E.2d 326, 258 N.Y.S.2d 380 (1965).

41. 339 U.S. 306 (1950).

42. *Id.* at 314.

43. *Id.* at 315.

44. *Id.* at 318. The Court was here considering an in rem action. Nonetheless, the Court indicated a high degree of confidence in the mails. *See also* Schroeder v. City of New York, 371 U.S. 208 (1962), where the Court was again faced with the question of whether the mails should be used instead of service by publication. In concluding that the defendant ought to have used the mails, the Court said, ". . . the city was constitutionally obliged to make at least a good faith effort to give [notice of the action] personally to the appellant—an obligation which the mailing of a single letter would have discharged." *Id.* at 214.

45. 339 U.S. at 319.

certified mail, *in accordance with the rules and customs of the United States post-office department.*[46]

Post office rule 39 C.F.R. 154.2[47] states that "[u]nless otherwise directed, an addressee's mail may be delivered to his employee or a member of his family."[48] This regulation would thus seem to allow the possibility of delivery to a young child or someone else lacking suitable age and discretion. The problem is compounded by the scope of the mail carrier's discretion. Although not authorized by any official regulation, a discussion with post office officials revealed that certified mail may even be delivered to a neighbor.[49] Such possibilities need not, however, automatically invalidate the proposed mailing provision. A slight modification would remedy some of the suggested difficulties. The post office return receipt form allows the sender to request that the return receipt indicate the address to which the envelope was delivered.[50] This indication should tend to deter the carrier's occassional practice of delivering the letter somewhere other than the address indicated on the envelope. If the summons were not delivered to the exact address, the return receipt would so notify the sender who could then take appropriate action.[51] The proposal should thus be modified to require that the sender request notification of the exact address to which delivery was made.

Concern over delivery of the summons to someone lacking suitable age and discretion need not be exaggerated. That phrase represents nothing more than the constitutional standard expounded in *Mullane*. Although the courts will not be able to read that phrase into the post office regulations as it would with a summons statute,[52] it is arguable that its inclusion is not necessary. The post office has been delivering mail for over a century; it has developed accepted methods for accomplishing that task, and certification is deemed to be among the surest of those methods. It is not therefore unreasonable to acknowledge such expertise and presume that

46. S. 5879, 193d Sess., § 1(b)(2) (1970); A. 632, 193d Sess., § 1(b)(2) (1970) (emphasis added).

47. 39 C.F.R. 154.2 (1970).

48. *Id.*

49. Telephone conversation with Mr. Samuel Graber, Superintendent of Postal Services, Buffalo, New York on October 1, 1970. Mr. Graber also indicated that there was an unwritten rule that certified letters should not be delivered to persons under 18 years of age. However, considerable weight is given to the carrier's knowledge of the persons on his route.

50. *See* 39 C.F.R. 168.4(d)(2) (1970).

51. The options open to the sender at this point include another attempt at mail service, or personal service under former CPLR § 308(1) or resort to the "nail and mail" provision in former CPLR § 308(3).

52. Reference is made to a self-contained statute which does not depend on any other statute or set of regulations for its implementation. The mailing provision, however, depends on the post office regulations.

certified mail will be delivered to the addressee. As with any method of substituted service, cases will arise in which the issue will be whether the defendant has received actual notice. The proposed mailing provision recognizes the possibility of non-delivery and provides for it by allowing the defendant to invoke section 317 if he meets the requisite requirements.[53]

Since the proposed mailing procedure is arguably constitutional, the primary issue is whether it would achieve the desired goals of service as well as, or better than, the new CPLR section 308(2). Certainly such a procedure would help reduce the incidence of "sewer service" since it eliminates the necessity of personally serving the defendant. At the same time it eliminates the cost of hiring a process server; the recently adopted CPLR section 308(2) does not. Furthermore, a return receipt is more reliable proof of service than an affidavit from the process server. Unlike return receipts, affidavits are highly susceptible to attack. The use of return receipts would tend to reduce the frequency of affidavit battles between the parties. It was just this abuse that the new CPLR section 308 (2) hoped to curtail.[54]

The 193rd session of the New York State Legislature enacted a major change in the service of process procedures. The new section 308(2) may reduce difficulties which arose under the former in-hand service provision; it does not, however, tend to solve the problems of excessive cost and affidavit abuse. A close watch should be kept on the operation of the new California provision and, at the same time, attention should be directed toward the practical workings of the new CPLR section. If old problems remain, the Legislature should give serious consideration to a procedure allowing mailed service of process in the first instance.

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LEGISLATION — CHILD PROTECTION PROCEEDINGS UNDER ARTICLE 10 OF THE NEW YORK FAMILY COURT ACT

Recently the New York Legislature has taken a fresh approach to a most shocking and tragic problem: child abuse and neglect. The New York Family Court Act, enacted in 1962, contemplated the problem of child neglect through specific legislation,[1] but made no separate provisions for the handling of child abuse. Consequently, throughout the statute's early

53. N.Y. CIV. PRAC. LAW § 317 (McKinney Supp. 1969). This provision allows the defendant to reopen a judgment and defend the action if the court finds that he did not receive notice and has a meritorious defense.

54. *See* note 15 *supra* and accompanying text.

1. N.Y. FAMILY CT. ACT art. 3 (McKinney 1963) (repealed 1970) [hereinafter cited as 1963 ACT].